

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA,

v.

DARRYL KINLOCH,

Defendant.

CASE NUMBER CR-4:20-00082

MOTION TO SUPPRESS HEARING
(VIA VIDEOCONFERENCE)

BEFORE THE HONORABLE CHRISTOPHER L. RAY
United States Courthouse
125 Bull Street
Savannah, Georgia
January 11, 2021

COURT REPORTER: Victoria L. Root, CCR (appearing remotely)
United States Court Reporter
Post Office Box 10552
Savannah, Georgia 31412
(912) 650-4066

1 A P P E A R A N C E S

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15

16 NOTE: Defendant appearing via videoconference from the
17 Chatham County Detention Center

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E X H I B I T S

<u>GOVERNMENT'S EXHIBIT NUMBER</u>	<u>IDENTIFIED</u>	<u>TENDERED</u>	<u>ADMITTED</u>
1	37	37	37
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PROCEEDINGS

(Proceedings called to order at 10:22 a.m.)

(An off-the-record discussion was held.)

THE COURT: All right. Let's go ahead,

Ms. Davenport, if we could, and call the case, please.

COURT CLERK: 4:20-CR-00082, United States of America v. Darryl Kinloch.

MS. MATEO: Good morning, Your Honor. Assistant United States Attorney Marcela Mateo on behalf of the Government, and we're ready to proceed today.

MR. WOODWARD: Good morning, Your Honor.

Steven Woodward on behalf of Mr. Kinloch. we're ready to proceed.

THE COURT: All right. Mr. Kinloch, are you able to hear the folks who are speaking in the background? You're at a -- they're at a significant distance from the microphone.

THE DEFENDANT: Yes, sir, Your Honor. A little bit, sir. yes. sir.

THE COURT: All right. Ms. Root, our court reporter, are you able to hear counsel?

THE COURT REPORTER: No, sir. Barely.

THE COURT: All right. Okay. we only have one microphone for the video link, and it is here present. The only thing I can think to do with respect to that is to invite counsel, during the pendency of this hearing, to come up a

1 little closer than you ordinarily would and present any
2 statements or arguments probably in the vicinity of the podium
3 but maybe even a little bit this side of the podium. And speak
4 loudly, and we'll try and proceed from there.

5 To that end, if you would, Ms. Mateo, come on up
6 here. Make your announcement again. We'll see if Ms. Root's
7 able to hear you a little bit better.

8 MS. MATEO: (Complied.)

9 THE COURT: Try it from there, please.

10 MS. MATEO: Good morning. Assistant United States
11 Attorney Marcela Mateo on behalf of the Government, and we're
12 ready to proceed.

13 THE COURT: Ms. Root, is that better?

14 THE COURT REPORTER: Yes, sir, much better.

15 THE COURT: All right. Similarly, Defense Counsel,
16 if you'd come forward and make your announcement.

17 MR. WOODWARD: Good morning, Your Honor.
18 Steven Woodward on behalf of Mr. Kinloch. We're ready to
19 proceed.

20 THE COURT: All right. Thank you, Counsel.

21 We are simply going to have to go slowly today. And,
22 Counsel, I'm going to have to ask you to come up and take that
23 position for each and every bit of presentation you're going to
24 make today. I'm not quite sure how we're going to manage with
25 witnesses on cross and response, but we'll figure that out as

1 we go along.

2 We are here today for purposes of addressing two
3 motions. The defendant has a pending motion to suppress filed
4 at Docket Entry Number 27. The defendant also has a motion for
5 release on bond with conditions at Docket Entry Number 39.

6 I propose that we will take up the suppression motion
7 first today and then pivot to the motion for release on bond.
8 I would point out, Counsel, that I recognize that some of the
9 facts and circumstances of the arrest back in February of 2020
10 would likely bear on the question of release on bond, and so,
11 if you'd like to cover that in the sort of natural flow of the
12 facts during the suppression portion of your presentation, you
13 can develop that evidence there so we don't have to hear it
14 twice.

15 Mr. Woodward, I note that, at Docket Entry 48, the
16 defendant had initially indicated that he would consent to a
17 video hearing for purposes of the motion on release versus
18 detention but that he would not consent to a video hearing on
19 the suppression motion.

20 I have been subsequently informed that by conducting
21 the hearing portion of the evidence -- the evidence and the
22 argument and the witnesses in person here in the courtroom with
23 Mr. Kinloch listening on the video that that is acceptable to
24 him.

25 Is that correct?

1 MR. WOODWARD: That is correct, Your Honor.

2 THE COURT: All right. So, Mr. Kinloch, just so we
3 are clear, I was informed that you wanted to have an in-person
4 hearing today on the question of your suppression motion. Your
5 lawyer is present. He will make his arguments in person today.

6 And you are willing to participate on the video link
7 by listening in; is that correct?

8 THE DEFENDANT: Yes, sir. Yes, sir, Your Honor.

9 THE COURT: All right. Thank you, Mr. Kinloch.

10 All right. So to that end, let us turn our
11 attention, then, to the suppression motion.

12 Let me pause for a moment.

13 Ms. Root, we're going to have a recurring problem
14 today in terms of trying to secure questions and answers on
15 the witness testimony. We will do our best. But if you have
16 problems hearing either, again, please, interrupt us.

17 Ms. Mateo, we are here. I will hear from the
18 Government first, please.

19 MS. MATEO: Yes, Your Honor. With that, the
20 Government would like to call Officer Devin O'Neill to the
21 stand.

22 THE COURT: All right. Very well. Officer O'Neill,
23 if you'll come forward, please.

24 MS. MATEO: Judge, would you like to maybe put a
25 chair right --

1 THE COURT: Yes.

2 MS. MATEO: -- in front?

3 THE COURT: That's what we're going to do.

4 MS. MATEO: Okay.

5 THE COURT: Officer O'Neill, if you'll turn, raise
6 your right hand, and face the clerk, she'll administer you an
7 oath.

8 (The witness, Devin O'Neill, was sworn.)

9 COURT CLERK: If you could state your name for the
10 record, please.

11 THE COURT: Officer Devin O'Neill.

12 COURT CLERK: Thank you.

13 THE COURT: You may be seated.

14 Please speak loudly, both counsel and the witness.

15 THE WITNESS: Yes, sir.

16 MS. MATEO: Your Honor, may I proceed?

17 THE COURT: Please, Ms. Mateo.

18 DEVIN O'NEILL,

19 having been duly sworn, was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MS. MATEO:

22 Q. Officer O'Neill, who is your employer?

23 A. The Savannah Police Department.

24 Q. And how long have you been with the Savannah Police
25 Department?

1 A. Approximately 2 and a half years.

2 Q. And are you in any current unit at this time?

3 A. I'm a detective with the Strategic Investigation Unit.

4 Q. And how long have you been with SIU?

5 A. Only about 3 months now.

6 Q. And prior to being hired by Savannah Police Department,
7 did you do any training or education for your current position?

8 A. I studied criminal justice at the University of Toledo.

9 I've got a bachelor's degree in that.

10 Q. And could -- and you also completed the POST training --

11 A. Correct.

12 Q. -- to become a police officer?

13 Officer O'Neill, I want to direct your attention to
14 February 9th, 2020.

15 Were you working that day?

16 A. Yes.

17 Q. Let's talk a little bit about a traffic stop that
18 occurred.

19 Can you describe what you observed when it came to a red
20 vehicle, please.

21 A. Yes. I was at Jimmy DeLoach Parkway and Benton Boulevard.
22 I was actually sitting at the light. And I observed a red
23 Camaro moving at a high pace of speed come from the wrong lane
24 of traffic -- it's a divided highway -- and come in front of my
25 vehicle at a high rate of speed across into the proper lane of

1 traffic at that point right at the light.

2 At that point, I turned off to catch up to the vehicle.
3 It was moving at a high rate of speed, so I didn't end up
4 catching up to the vehicle until, I believe, Jimmy DeLoach
5 Parkway and Crossroads Parkway, where I initiated the --

6 MR. WOODWARD: Objection --

7 A. -- traffic stop.

8 MR. WOODWARD: -- Your Honor. I'm just going to ask
9 that the officer refer to his memory rather than his report.

10 THE COURT: Well, hold on.

11 Ms. Mateo, do you have any (indiscernible; audio
12 disruption)?

13 MS. MATEO: No.

14 UNIDENTIFIED SPEAKER: We lost --

15 MS. MATEO: That's fine.

16 UNIDENTIFIED SPEAKER: -- the jail. We lost the
17 jail.

18 THE COURT: All right. We have lost Mr. Kinloch,
19 so we will just sit tight until that communication can be
20 restored.

21 (Pause in proceedings from 10:29 a.m. to 10:33 a.m.)

22 THE COURT: All right. Ms. Mateo, you can continue
23 your direct examination.

24 BY MS. MATEO:

25 Q. And, Officer O'Neill, I see that you put your report away.

1 If at any point you don't remember anything, you can pull your
2 report to refresh your memory. But at this point, if you'll
3 just testify (inaudible).

4 THE COURT: And, again, please, loudly, folks.

5 BY MS. MATEO:

6 Q. You testified that you saw this vehicle driving very
7 quickly and on the wrong side of traffic.

8 What violations, at that point, did that car commit?

9 A. Driving on the wrong side of the road. And at that
10 point, it had just, in that one -- and then as I followed it,
11 it committed more traffic infractions as well, too.

12 Q. So did you pull it over for a traffic stop?

13 A. Correct.

14 Q. And what happened then?

15 A. At that point, as I was coming out of my vehicle, I could
16 see through the back window of the vehicle that Mr. Kinloch was
17 digging through the vehicle, which heightened my senses greatly
18 because, from my training and experience, individuals tend to
19 try to conceal firearms or narcotics when they reach around in
20 the vehicle as you're walking and approaching.

21 Q. And you mentioned -- you said "Mr. Kinloch."

22 Is that the individual driving the vehicle?

23 A. Yes.

24 Q. And you later identified him as Mr. Kinloch?

25 A. Yes.

1 Q. And I know this is a strange situation, but looking at the
2 screen, is that the individual that you pulled over that day on
3 February 9th, 2020?

4 A. with the mask, it's a little hard, but I believe that to
5 be Mr. Kinloch.

6 MS. MATEO: Your Honor, for purposes of
7 identification, would you like him to pull down his mask,
8 or can I make notice that, at this point, the witness has
9 identified the defendant?

10 THE COURT: I'm willing to accept that
11 identification.

12 MS. MATEO: Thank you, Your Honor.

13 BY MS. MATEO:

14 Q. You stated that you observed Mr. Kinloch digging around in
15 the seat in the (indiscernible; audio disruption).

16 what, if anything, did you do next?

17 A. At that point, I stayed at the rear of the vehicle --
18 that way, I was at a safer position -- and I gave loud verbal
19 commands to shut off the vehicle and to actually toss the keys
20 out of the window.

21 Q. And when you say you stayed at the rear of the vehicle, is
22 this where the trunk is of the car?

23 A. Correct.

24 Q. Did you ever approach the window at that point?

25 A. Not initially, no.

1 Q. And when you said "verbal commands," what exactly did you
2 ask Mr. Kinloch to do?

3 A. To shut off the vehicle. And then I had him place the
4 keys out of the window, and I told him to toss them out the
5 window.

6 Q. Why did you do that?

7 A. Basically, at that point, with how he was acting and the
8 way he had been driving, I was kind of worried that he might
9 put the car into gear or something unsafe might happen, so I
10 just kind of wanted to make sure the vehicle was off and then
11 that the keys were out the window so nothing could happen from
12 there.

13 Q. What, if anything, did you think he perhaps had violated
14 with what you observed in his driving?

15 A. I thought, I mean, it was possible that he was under the
16 influence at that point because of multiple lane violations as
17 well as driving on the wrong side of the road at a high rate of
18 speed at that time of night.

19 Q. Did he comply with those commands?

20 A. He complied with that first command to shut off the
21 vehicle, but he did not comply with tossing the keys out of the
22 vehicle. He just held them in his hand.

23 Q. What happened next?

24 A. I removed the keys from his hand, and then I addressed
25 Mr. Kinloch.

1 Q. And, at that point, had you stepped back from the window,
2 or were you still around the window at that point?

3 A. I was pretty close. I was standing there, I believe,
4 right by the driver at that point just speaking to him and went
5 from there.

6 Q. At any point, did you remove Mr. Kinloch from the vehicle?

7 A. I did, yes.

8 Q. And what did you do next?

9 A. I patted Mr. Kinloch down for weapons just for safety due
10 to the fact that he was reaching around beforehand in the
11 vehicle. I didn't know whether he had retrieved a weapon. And
12 then, obviously, with just, like -- he -- when I started to ask
13 him initial questions, he wasn't very cooperative, like wasn't
14 giving me answers that were very direct, so . . .

15 Q. And were you alone at this point?

16 A. Officer Bishop had arrived on scene.

17 Q. And what, if anything, did you observe as you pulled him
18 out of the vehicle as it relates to his behavior or speech?

19 A. I could smell an odor of alcohol. And like I said, he
20 wasn't very direct and just kind of seemed a little out of it.

21 Q. Did he speak to you?

22 A. He did.

23 Q. Was his speech normal?

24 A. No. It was a little slurred.

25 Q. What happened next?

1 A. We brought him back. Officer Bishop does standardized
2 field sobriety, so he took over that portion.

3 Q. And at any point, did you hear anything over dispatch?

4 A. A traffic BOLO was issued for Jimmy DeLoach Parkway of a
5 red sports car driving on the wrong side of the road.

6 Q. You said a traffic -- what was issued?

7 A. It's a traffic BOLO, be on the lookout for, basically, for
8 officer -- it's like an officer advisory.

9 Q. And at that point, did you respond?

10 A. Yeah. I responded that I believed that vehicle to be the
11 vehicle I had stopped.

12 Q. You had -- and officer Bishop arrived, and he was
13 performing the sobriety test; is that correct?

14 A. Yes.

15 Q. What were you doing at this point?

16 A. At that point, I just kind of held back. I shut off the
17 lights on the vehicle, which is required for us to see. So,
18 basically, it allows -- and so we can look at the eyes. He
19 asked me to do that and then retrieve his phone. But I just
20 kind of stood back a little and kind of observed some of it.

21 Q. And when you said you turned off the lights of the
22 vehicle, which vehicle?

23 A. Both vehicles, the front and -- the front lights.

24 Q. Of your vehicle?

25 A. Yes. And I believe his as well, too.

1 Q. Officer Bishop's?

2 A. I believe so, yes.

3 Q. And at some point, did officer Bishop inform you he was
4 going to put the defendant under arrest?

5 A. Yes.

6 Q. For what?

7 A. Driving under the influence.

8 Q. And what proceeded to happen next?

9 A. At that point, we had attempted to place him in handcuffs.
10 I felt Mr. Kinloch tighten up and tense, and then he kind of --
11 it was kind of like a -- it was like "No," and he just pulled
12 away from me and tried to rip away. I tried to grab on to him.
13 I felt him kind of strike the side of my head. I don't know if
14 it was, like, a closed or open fist.

15 We proceeded then to wrestle and fight. We rolled
16 down and -- kind of like off the road into a ditch area.
17 Officer Bishop ended up deploying his Taser. I don't know if
18 it was once or twice. Mr. Kinloch continued to fight.

19 I was finally able to take his back and put him in a
20 seat belt position. And at that point, I was able to kind of
21 direct Officer Bishop to grab his hand and put him in
22 handcuffs. He was still actively resisting us. And at that
23 point, we were finally able to get him into handcuffs.

24 Q. You said that you felt something strike your head.

25 Was this Mr. Kinloch?

1 A. Yes.

2 Q. And you used the phrase "actively resisting."

3 Was this his behavior, or were you also giving him
4 commands at that point?

5 A. I mean, we were giving him verbal commands. He wasn't
6 responding at that point.

7 THE COURT REPORTER: Can I ask a question quick? I'm
8 sorry.

9 THE COURT: Go right ahead, Ms. Root.

10 THE COURT REPORTER: I was just wondering if we could
11 maybe have Mr. Kinloch's mic muted. I can hear doors slamming
12 in the background. And that might clear --

13 THE COURT: Sure. I can ask at the jail if it would
14 be possible to mute Mr. Kinloch's microphone.

15 All right. It seems quieter, Ms. Root. I think they
16 have muted it.

17 THE COURT REPORTER: Yes, sir. That's much better.
18 Thank you.

19 THE COURT: Please proceed, Ms. Mateo.

20 BY MS. MATEO:

21 Q. And, Officer O'Neill, do you remember the conditions of
22 the day? Was it around what time? Was it dark?

23 A. I believe it was approximately around 9:45 in the evening.
24 It was dark.

25 Q. And what was the weather, if you remember?

1 A. I believe it was clear, a little cold.

2 Q. After the defendant was put in handcuffs, what happened
3 next?

4 A. At that point, we got him up to our patrol vehicle. We
5 had trouble getting him in. He didn't want to get in the car.
6 We actually had to pull him into the car from the other side to
7 get him in. He was kicking his feet out to keep the doors
8 open. But we were finally able to get him into the vehicle.

9 Q. And what happened after he was put in the vehicle?

10 A. Basically, some of the other officers kind of arrived on
11 scene. We kind of took a minute to catch our breath. I wasn't
12 feeling so well, so we took a minute to kind of, like, gather
13 our breath. And, like I said, I had to throw up a couple
14 times. I was pretty spent, so . . .

15 Q. And, Officer O'Neill, you said that you had felt sick.

16 Had you felt sick earlier that day?

17 A. Yeah. I hadn't felt very well earlier that day, but this
18 just kind of put -- pushed it over the top, I guess.

19 Q. And when you say "this," do you mean the traffic stop or
20 the tussle?

21 A. The physical altercation.

22 Q. And approximately, if you remember, officer O'Neill, how
23 many minutes did it take you to recover from your sickness?

24 A. The best approximation I could give you is going to be
25 10 to 15. That's approximate.

1 Q. And at some point, did you receive medical services?

2 A. EMS came over and talked to me, but that was it.

3 Q. Did you ever approach the defendant's vehicle again?

4 A. I did, yes.

5 Q. And was this after you were feeling better?

6 A. Yes.

7 Q. Will you please explain what occurred when you approached.

8 A. I could smell the odor of marijuana emitting from the open
9 window of the car.

10 Q. And was the window up or down?

11 A. The window was down.

12 Q. And as you approached the vehicle and smelled this odor of
13 marijuana, was this the closest -- or -- in comparison to your
14 first stop with Mr. Kinloch, the defendant, can you describe
15 how close you were to the vehicle?

16 A. I was right -- standing by the door on the outside of
17 the vehicle. That's the closest I had been during that time --
18 at that -- so far at that time.

19 Q. And the second time you approached the vehicle, did you go
20 closer?

21 A. Yes.

22 Q. Officer O'Neill, did you ever pass the threshold of the
23 window?

24 A. I did not.

25 Q. And where is your body-worn camera located?

1 A. It is on our chest.

2 Q. And that was recording during this whole traffic stop?

3 A. Yes, it was.

4 Q. At any point, Officer O'Neill, did you put your body or
5 face into the vehicle?

6 A. I did not.

7 Q. As a result of this, was the vehicle then searched?

8 A. It was.

9 Q. And what, if anything, was found?

10 A. I located two firearms. One was directly under the
11 driver's seat, and then there was one in the center console in
12 direct reach of Mr. Kinloch. There was also located a small
13 marijuana blunt which field-tested positive. And then I was
14 informed that a plastic container containing, like, alcohol
15 res- -- or, like, a little bit of alcohol was also located
16 under the front passenger's seat.

17 Q. And when you say you were informed of that alcoholic
18 residue, who informed you of that?

19 A. I -- it was either Officer Bishop or Officer Lloyd. It
20 was one of those two individuals.

21 Q. You had mentioned that it field-tested positive.

22 So that small amount tested positive for marijuana, just
23 to clarify?

24 A. Correct.

25 Q. And were these items then logged in for evidence?

1 A. Yes, they were.

2 Q. Did you become aware at any time that Officer Bishop had
3 searched the vehicle prior to the search that you were involved
4 in?

5 A. No.

6 Q. And based on your observations, what did you believe about
7 Defendant Kinloch and his current state?

8 A. He -- it may -- he was altered, possibly under the
9 influence of narcotics or alcohol or both.

10 Q. And what is --

11 MR. WOODWARD: I'm going to object based on
12 foundation.

13 THE COURT: Hold on. If you're going to be heard,
14 come forward and make your observation loudly enough. Avoid
15 Ms. Mateo.

16 MR. WOODWARD: Objection, Your Honor, based on
17 foundation and -- as an expert.

18 THE COURT: All right. Ms. Mateo, I'll hear your
19 response.

20 MS. MATEO: He's able to answer based on his training
21 and experience as an officer. He does not need to be an expert
22 to testify as to his observations and his conclusion regarding
23 what he observed.

24 THE COURT: Objection is overruled.

25 (No omissions)

1 BY MS. MATEO:

2 Q. And you had mentioned some observations about his slurred
3 speech, but what, if anything, did you observe about his eyes?

4 A. His pupils were dilated or small. They were either bigger
5 or smaller. I couldn't give you direct -- but they were not
6 natural. They weren't normal.

7 Q. And you said alcohol or narcotics.

8 What led you to believe that?

9 A. The slurred speech led me towards the alcohol, but his
10 heightened state told me that -- basically from my training and
11 experience, that he might be under narcotics as well -- too.

12 Q. And when you say "heightened state," was this during your
13 interactions with him?

14 A. Yeah, during my interactions from -- like, from the
15 agitated part to just his indirectness towards questions and,
16 like, lack of focus.

17 Q. At any point, was the defendant asked for a driver's
18 license?

19 A. Yes, right before we were going to place him in handcuffs.

20 Q. And was he able to produce a driver's license?

21 A. He produced a wallet. I believe there was a driver's
22 license in it, but, at that point, I wasn't able to, I believe,
23 get the license out.

24 Q. Was any further investigation done on the vehicle of who
25 it belonged to?

1 A. I believe it was -- it may have been belonged to a --
2 I don't know if it was a family member or friend of
3 Mr. Kinloch's. I believe a person showed up on scene to take
4 possession of that vehicle that was a family or friend member
5 [sic] of Mr. Kinloch's.

6 Q. And so that vehicle was never towed? It was returned back
7 to that individual?

8 A. Correct. It was not towed.

9 Q. Also, Officer O'Neill, was any further investigation done
10 on Mr. Kinloch and his criminal history?

11 A. Yes. Another officer -- I don't know who it was -- I
12 believe, checked and -- to see if he was a convicted felon.

13 Q. And was he, in fact, a convicted felon?

14 A. Yes.

15 MR. WOODWARD: Objection as to relevance, Your Honor.

16 THE COURT: Your response, Ms. Mateo?

17 MS. MATEO: Yes. It's just completing the facts
18 as to the final portion of the arrest and ultimately what was
19 found by officers during that investigation.

20 THE COURT: Well, on the issue of suppression, I'm
21 not sure how relevant it may have been, but I did invite
22 totality of evidence as it may pertain to issues of release
23 versus detention, and his history as a felon may bear on that
24 question. So to that extent, the objection is overruled.

25 MS. MATEO: I have no more questions for this

1 witness.

2 THE COURT: Thank you, Ms. Mateo.

3 Mr. Woodward, if you'd like to come forward to the
4 same position, your witness on cross.

5 MR. WOODWARD: Your Honor, may I ask if I could move
6 the podium up?

7 THE COURT: It does not move that far, Mr. --

8 MR. WOODWARD: Oh, it does not?

9 THE COURT: It's wired in. So I'd suggest -- why
10 don't you step to the side -- step to the side of it and use
11 the top surface.

12 CROSS-EXAMINATION

13 BY MR. WOODWARD:

14 Q. Good morning, Officer O'Neill.

15 A. Good morning.

16 Q. First of all, I was just wondering: Did you do -- I
17 believe there's a police report as part of this --

18 A. Yes.

19 Q. -- case; correct?

20 Did you do any other kind of reports other than your main
21 police report?

22 A. No.

23 Q. You didn't do a use of force report?

24 A. Oh, I did do a use of force, correct.

25 Q. You did do a use of force report?

1 A. Yes, sir.

2 MR. WOODWARD: Your Honor, I don't believe I received
3 that report, so I just ask that that be turned over under 26.2
4 unless it's something that I . . .

5 MS. MATEO: One moment, Your Honor. We're verifying.

6 THE COURT: All right. Thank you.

7 MS. MATEO: Your Honor, the Government reviewed the
8 initial report. And at this point, we see that we have one
9 police report.

10 And the use of force, would that be --

11 May I ask the witness just for clarification?

12 THE COURT: You may.

13 MS. MATEO: Was that a separate report?

14 THE WITNESS: That may have been before blue team, so
15 it may just be where we clicked on the drop-down in the initial
16 report. So it may just be the initial report with the extra
17 drop-down tabs. Probably -- a blue team wasn't probably
18 completed, which is what we switched to later on.

19 MS. MATEO: And is this --

20 THE COURT: Let me interrupt, Counsel. The issue,
21 of course, is going to be whether we have something that
22 qualifies as a statement under 26.2.

23 You can continue, Ms. Mateo.

24 MS. MATEO: Yes.

25 So was it a statement that you wrote additionally, or

1 did you just check boxes for use of force?

2 THE WITNESS: Checked boxes. That was it.

3 MS. MATEO: So your --

4 THE COURT: Do you have access to this data,
5 Ms. Mateo?

6 MS. MATEO: Your Honor -- and that's what I just
7 spoke about with the case agent, and she confirmed that it
8 would be the same report but she -- they would have checked
9 if it was to be used for use of force as well. So the same
10 statement would have been used. And we can ask the witness.

11 Did you write any additional information on that
12 second use of force report?

13 THE WITNESS: No.

14 MS. MATEO: We don't have a copy of a use of force
15 report. We are -- we believe it is the same report. It was
16 just with a check box that it was supposed to be used for use
17 of force due to the system.

18 THE COURT: Mr. Woodward, do you have any additional
19 questions of the witness on this issue?

20 BY MR. WOODWARD:

21 Q. Officer O'Neill, you don't think you wrote a separate
22 narrative?

23 A. No. It was only the box on that original report, if I --
24 like I said, I think -- what I was thinking of -- we do the
25 blue team now. It's a separate report. But back then, we did

1 not. It was just a drop-down menu on that original report.

2 Q. So what you're saying is you just marked an additional one
3 box saying that this also was a report for any use of force?

4 A. Yes, correct.

5 MR. WOODWARD: Your Honor, I have no further
6 questions. Based on that, I feel comfortable proceeding. I
7 would ask, if there is a use of force report beyond this, that
8 it be turned over at -- clearly, as soon as possible.

9 THE COURT: To be clear, then, just for the record,
10 Defendant is withdrawing any request for the production of the
11 report, to the extent it exists, at this point under 26.2 but
12 does make a general request for its production in discovery.

13 So to that end, Ms. Mateo, whatever you have that
14 memorializes this use of force, please produce it at your
15 earliest opportunity.

16 MS. MATEO: Yes. And any negative finding, we will
17 send an e-mail to Defense Counsel as to what we find regarding
18 any use of force.

19 THE COURT: Very well.

20 Proceed, Mr. Woodward.

21 MR. WOODWARD: Thank you, Your Honor.

22 BY MR. WOODWARD:

23 Q. You were patrolling, you said.

24 You were stopped at Jimmy DeLoach and Benton Boulevard; is
25 that correct?

1 A. Yes.

2 Q. Is that your normal patrol area?

3 A. I was up in the Highlands that day, so it was not my
4 normal patrol area.

5 Q. And what was your -- what were you doing that night?

6 A. I was working in a patrol function in the Savannah
7 Highlands area.

8 Q. Why were at that particular position?

9 A. That's where I was assigned that day.

10 Q. Now, you -- once you lit up your blue lights, the red car
11 pulled over immediately; right?

12 A. Correct.

13 Q. And Mr. Kinloch got out of the vehicle once you asked him
14 to get out; correct?

15 A. When I asked him to get out of the vehicle, I believe so.

16 Q. And you asked him whether he had been drinking, and he
17 told you no; correct?

18 A. Yes.

19 Q. At this point, he wasn't having coordination issues, was
20 he?

21 A. Not that I'm aware of.

22 Q. He wasn't stumbling?

23 A. No.

24 Q. He wasn't swaying?

25 A. Not that I can recall.

1 Q. Okay. And you said that you stood back and watched some
2 of the field sobriety tests as they were being conducted by
3 Officer Bishop?

4 A. Correct.

5 Q. And he wasn't swaying or stumbling during that time
6 either; correct?

7 A. I can't recall that. I wasn't really paying attention
8 closely to the FST portion.

9 Q. Understood. Do you remember at one point he -- during the
10 test, he noticed his keys and asked you to pick them up?

11 A. I don't recall. Maybe.

12 Q. Do you recall that he could not complete the test because
13 of a back injury?

14 A. I remember him mentioning that, yes.

15 Q. Do you remember if he showed the -- a scar on his back to
16 Officer Bishop?

17 A. Yes.

18 Q. And Officer Bishop stopped the test at that point; right?

19 A. Not that I'm aware of.

20 Q. If the test was stopped, not that you're aware of?

21 A. No.

22 Q. This was right before you arrested Mr. Kinloch, though;
23 correct?

24 A. Correct.

25 Q. Now, you testified on direct that you observed a red car

1 driving the wrong path of travel; correct?

2 A. Correct.

3 Q. But at the scene, you weren't sure you had observed that
4 car going the wrong direction; right?

5 A. I was looking at the light, so I watched him come through
6 the intersection. But, basically, at that point, I just waited
7 and got additional probable cause as well as just for the --
8 I wanted to make sure. But yes, I did observe him come across
9 the intersection, you know, from the wrong lane of traffic.

10 Q. Well, you told other officers on the scene it looked like
11 he was going in the wrong direction?

12 A. Correct.

13 Q. You're not sure he was going in the wrong direction;
14 right?

15 A. He was.

16 Q. But you told Officer Lloyd, for instance, that someone
17 was coming across like they were just coming from the opposite
18 lane?

19 A. Yeah.

20 Q. Did you ever lose sight of the red car?

21 A. I did not.

22 Q. So the red car that you had saw at Benton Boulevard was
23 the red car that you stopped?

24 A. Correct.

25 Q. Now, you also testified that you saw Mr. Kinloch digging

1 through the vehicle --

2 A. Correct.

3 Q. -- prior -- well, before you approached the car?

4 A. Yes.

5 Q. But you weren't sure he was digging through the vehicle;
6 right?

7 A. I could see his hand through the back window digging
8 around, it looked like, either behind the seat or in the back
9 area of the seat area in general.

10 Q. You told officers that he was moving around in the
11 vehicle --

12 A. Correct.

13 Q. -- and acting weird?

14 A. Yes.

15 Q. And you said he might have touched something else?

16 A. Yes.

17 Q. Mr. Kinloch was on the phone when you initially approached
18 the window; correct?

19 A. Correct.

20 Q. And you talked about slurred speech on direct?

21 A. Yes.

22 Q. You didn't write anything about slurred speech in your
23 report, did you?

24 A. I can't -- without looking at it, I can't tell you exactly
25 if I did or not.

1 Q. If I showed you your report, would that refresh your
2 recollection. Or you have it in front of you?

3 A. Yes.

4 Q. Would you like to take a look at it?

5 A. (No response.)

6 Q. Would that -- sorry. Would that refresh your recollection
7 of whether that put you on your --

8 A. I can look. If -- yeah, I can look. I'm capable of doing
9 that, yes.

10 Q. Well, go ahead and review the report.

11 THE COURT: Hold on one second, Mr. Woodward.

12 Ms. Mateo, did you have an objection?

13 MS. MATEO: Your Honor, I'm not sure if he's trying
14 to refresh his recollection or trying to impeach him in the
15 sense of whether it's in his report or not; however, the
16 officer answered he doesn't recall if it was in his report, and
17 I believe that's a sufficient answer.

18 THE COURT: It may be. But it may also still be an
19 effort at impeachment even if he doesn't recall.

20 So if -- Mr. Woodward, if you'd like to direct him
21 to a particular locale in the report and question him about it,
22 you're welcome to do so.

23 MR. WOODWARD: Well, I am attempting to refresh his
24 recollection, Your Honor.

25 THE COURT: Well, either way, if you could direct him

1 to a particular locale in the report and ask him about it.

2 MR. WOODWARD: Yes, Your Honor.

3 BY MR. WOODWARD:

4 Q. If you could take out your report, Officer O'Neill. I'm
5 looking at Page 3 of your report.

6 A. Okay.

7 Q. And I'm looking at Paragraph Number 3 where you said you
8 could smell a strong odor of alcohol coming from the suspect.

9 A. Yes.

10 Q. At that time, you didn't reflect anything else -- any
11 other signs of impairment; correct?

12 A. I did not, no.

13 Q. Including slurred speech?

14 A. Yes.

15 Q. Thank you.

16 I want to talk a little bit about Officer Bishop's search.

17 On direct, you said that you -- you weren't aware that
18 Officer Bishop searched the car; is that right?

19 A. Correct.

20 Q. But, actually, he told you he was going to search the car?

21 A. I don't recall if he did or not.

22 Q. He said -- actually, you saw him start to search the car.

23 Do you remember that?

24 A. I don't.

25 Q. Okay. Do you remember telling him, "wait on that"?

1 A. I may have said something along those lines about waiting
2 to search the -- about waiting to search the car, but I thought
3 that was in -- when we were talking.

4 Q. When you were talking with who?

5 A. Officer Bishop.

6 Q. So you're saying that you -- you're still testifying that
7 you did not see him search the car, though; correct?

8 A. I don't believe I did, no.

9 MR. WOODWARD: Your Honor, this is going to be a
10 little bit difficult because my computer is over there.

11 THE COURT: That's fine. Tell me what you want to --
12 do you want to make use of the video for some purpose?

13 MR. WOODWARD: Yes, for impeachment purposes,
14 Your Honor.

15 THE COURT: Do you have a particular segment that you
16 intend to go to and show the witness, or do you want to ask
17 him a ques- -- tell me what you want to do mechanically. We'll
18 make it work.

19 BY MR. WOODWARD:

20 Q. Let me say this. Officer Bishop told you that he was
21 going to search the car related to DUI?

22 A. Yes.

23 Q. Okay. But you're saying that you weren't aware that he
24 did do that?

25 A. I was -- I believe this was the part where I was kind of

1 sitting there kind of gassed. I was tired and throwing up,
2 so I can't directly say whether I saw him actually go over and
3 start to do it or not.

4 Q. But you're aware that he was going to do it?

5 A. He said he was going to do it.

6 Q. And you told him to wait on that?

7 A. Yes.

8 Q. But in any event, you're now aware that he did search the
9 car; correct?

10 A. Now that you're telling me, yes.

11 THE COURT: Mr. Woodward, I'm not trying to preclude
12 you from using your video in any way. I just --

13 MR. WOODWARD: No. I understand. I think I got what
14 I need, Your Honor.

15 THE COURT: All right. Very well.

16 MR. WOODWARD: Thank you.

17 BY MR. WOODWARD:

18 Q. And Officer Bishop removed two containers from the car; is
19 that correct?

20 A. I can't speak for him on that.

21 Q. Well, he told you that he had not found any evidence of
22 DUI after the fact?

23 A. I don't recall that.

24 Q. If I showed you video from your body-worn camera, would
25 that refresh your recollection?

1 A. If you can show me video, absolutely.

2 MR. WOODWARD: Is that all right, Your Honor?

3 THE COURT: You may, Mr. Woodward. Just for the
4 benefit of the record, Mr. Woodward, are you able to tell us at
5 all, first, whose camera this is and any time stamp you intend
6 to show us?

7 MR. WOODWARD: Yes, Your Honor. This is -- this is
8 officer Bishop's body-worn camera. It's Exhibit B to my
9 motion. I did -- I forgot that -- I believe the Government was
10 going to make a motion to admit these exhibits into evidence
11 for this motion, sir, as well. Hopefully, they'll enter them
12 into evidence.

13 THE COURT: All right.

14 MR. WOODWARD: This will be Exhibit B.

15 THE COURT: Exhibit B to what, Mr. Woodward?

16 MR. WOODWARD: I'm sorry?

17 THE COURT: Exhibit B to what, Mr. Woodward?

18 MR. WOODWARD: To the motion -- to my motion to
19 suppress evidence.

20 THE COURT: I thought Exhibit B to your motion was a
21 sealed medical record document.

22 MR. WOODWARD: Oh, that is for the motion for
23 release.

24 THE COURT: That's Exhibit B to your motion for
25 release. I'm so sorry.

1 All right. Let me pull up your motion to suppress.

2 MS. MATEO: Your Honor, just to make it easier,
3 because I would like to make this easier, the Government has
4 Exhibit 1, which is Officer O'Neill's, and Exhibit 2, which
5 is Officer Bishop's body-worn camera. I believe this is what
6 Defense would like to use.

7 I am not going to be difficult. I am happy to admit
8 these -- I guess he's stipulating -- into evidence. They were
9 attached to Defense's motion, and the Government also referred
10 to these in their response.

11 But for clarification -- I don't know if you can hear
12 me -- of the record, we will admit them at this time so they
13 are part of this hearing. Again, Government's Exhibit 1 is
14 Officer O'Neill's body-worn camera. Government Exhibit 2 is
15 Officer Bishop's. I believe that's with no objection.

16 MR. WOODWARD: No objection.

17 THE COURT: All right. Very well. Government's
18 Exhibit 1 and 2 are admitted without objection, 1 being the
19 body-worn camera of Officer O'Neill, 2 being the body-worn
20 camera of Officer Bishop. And we can just use those
21 evidentiary numbers for what you're about to present.

22 You're about to present from Government's 2, the
23 Bishop --

24 MR. WOODWARD: Yes, Your Honor.

25 THE COURT: -- the Bishop body-worn camera?

1 MR. WOODWARD: Yes, Your Honor.

2 THE COURT: And what time stamp, Mr. Woodward?

3 MR. WOODWARD: It's going to be time stamp 2200,
4 Your Honor.

5 THE COURT: All right. Very well.

6 Thank you, Ms. Mateo.

7 MS. MATEO: Your Honor, as -- the Government would
8 object to any portion of Bishop's body-worn camera that shows
9 a shirt -- search or anything that Officer O'Neill was not
10 present at, like an officer cannot be impeached by a report by
11 another officer. Officer O'Neill is only familiar with his
12 own facts as well as his own testimony and his own body-worn
13 camera.

14 I am not sure what Defense is going to put up, if
15 it's going to be the search or any discussions with
16 Officer O'Neill. But for any portion of the search that
17 Officer O'Neill was not present for, we would object to any
18 questions for relevance as he was not present.

19 THE COURT: Well, let me do this. I have to reserve
20 ruling on that objection because I have yet to see this video.
21 I don't know what it contains. It seemed to me it was more
22 likely to contain something that Officer O'Neill had witnessed,
23 because I think that was the thrust of the examination.

24 But, Mr. Woodward, go ahead and show your segment.

25 And, Ms. Mateo, you can renew your objection if need

1 be.

2 MS. MATEO: Thank you, Your Honor.

3 MR. WOODWARD: Your Honor, I'm going to play --
4 just for the record, I think it is on the -- it is Exhibit 2
5 time-stamped 2200.

6 (video playing.)

7 (video stopped.)

8 BY MR. WOODWARD:

9 Q. I'm just going to pause it there.

10 Can you tell at this point whether this is your body cam,
11 Officer O'Neill?

12 A. This is not my body cam.

13 Q. Can you tell whose body cam it is?

14 A. You said when you pulled it up it was Officer Bishop's.

15 Q. Okay.

16 (video playing.)

17 BY MR. WOODWARD:

18 Q. (Inaudible) on it; correct?

19 A. Yes.

20 Q. And he said he wanted to search it incident to DUI;
21 correct?

22 A. I believe he said something about the DUI, yeah.

23 THE COURT: All right. Let's hold a moment.

24 Ms. Mateo, your objection?

25 MS. MATEO: Your Honor, as --

1 THE COURT: Hold on. Hold on. Let's pause that
2 video.

3 (video stopped.)

4 THE COURT: Hold on. Let's wait for Ms. Root.

5 THE COURT REPORTER: Judge, I can barely hear
6 Mr. Woodward. Everyone's getting lower and lower.

7 THE COURT: Thank you, Ms. Root.

8 Mr. Woodward, come further forward, if you would.

9 Ms. Mateo, you were about to interpose an objection.
10 why don't you come forward as well.

11 MS. MATEO: Your Honor, the Government would withdraw
12 it. we'll just use it in an argument based on the Court
13 looking at the video, and I'll make argument at a later point.
14 Thank you, Your Honor.

15 THE COURT: Mr. Woodward, you may continue with your
16 cross-examination.

17 BY MR. WOODWARD:

18 Q. And you had also said, Officer O'Neill, that you didn't
19 remember whether Bishop told you that he didn't find evidence
20 of DUI?

21 A. I don't recall.

22 Q. Would the video refresh you on that as well?

23 A. Possibly. I mean, whatever . . .

24 MR. WOODWARD: It looks like time stamp 3050,
25 Your Honor.

1 BY MR. WOODWARD:

2 Q. Is that you there? I paused at 3050.

3 A. That was me, yes.

4 THE COURT: Mr. Woodward, hold on one second. I
5 realize you're turning your head to deal with that. But every
6 time you do, you're depriving our court reporter of the
7 opportunity to hear you. You've got to be facing this way and
8 closer.

9 I'll give you all the time you need to move back and
10 forth. We'll go as slowly as we need to. But she has to
11 capture everything you say, so come on up, look at me, and make
12 it loud.

13 MR. WOODWARD: Understood.

14 BY MR. WOODWARD:

15 Q. Officer O'Neill, you can see the pause -- the still frame
16 from that video; correct?

17 A. Correct.

18 Q. And that is you pictured on the screen?

19 A. Yes.

20 (video playing.)

21 (video stopped.)

22 MR. WOODWARD: I'm going to go back just a little bit
23 because I think we missed it. I'm going to go back just a
24 little bit because I think we may have missed it.

25 (video playing.)

1 (Video stopped.)

2 BY MR. WOODWARD:

3 Q. So he told you -- officer Bishop told you,
4 Officer O'Neill, that he didn't find any evidence of DUI during
5 his search; correct?

6 A. I don't know if I heard it at all. I'm standing there,
7 but I don't know if I acknowledged it or not. I don't know if
8 he was talking to me or who he was talking to at that time.

9 Q. Now, speaking of whether you heard him, after this, you --
10 that's Officer Lloyd on the other side of you; correct?

11 A. Correct.

12 Q. Okay. After this, you-all had a conversation about a
13 potential search; right?

14 A. I believe so.

15 Q. You had said on direct that you never approached the car
16 after the first time speaking with Mr. Kinloch when you removed
17 him from the vehicle; right?

18 A. Are you talking about from removing him from the vehicle?
19 Can you clarify?

20 Q. Let me say that again.

21 You testified on direct that you were never near the car
22 again prior to your second search -- prior to your search of
23 the vehicle?

24 MS. MATEO: Objection, Your Honor. I believe it was
25 his testimony that he was never near the window, the front of

1 the car, not the vehicle.

2 THE COURT: I think that's my recollection as well,
3 Mr. Woodward. You may continue.

4 Objection is -- the objection is -- well, it's not
5 even an objection. It just sort of a comment. To the extent
6 it mischaracterizes the testimony, the objection is sustained.

7 Continue, Mr. Woodward.

8 BY MR. WOODWARD:

9 Q. Well, fair to say, prior to your search, you were outside
10 of the car; correct?

11 A. In this video right here, yes.

12 Q. And fair to say that you're quite close to the open
13 window; correct?

14 A. Right there, yes.

15 Q. And after this, you and Officer Lloyd and Officer Bishop
16 have a conversation about the legality of the search; correct?

17 A. We talked about the search, yes.

18 Q. And Officer Lloyd was concerned about the legality of the
19 search; right?

20 A. I can't speak on what Officer Lloyd thought.

21 Q. Well, he told you he wanted to make sure you weren't going
22 to have any legal issues; right?

23 A. He may have said -- I can't -- like I said, I can't recall
24 exactly what Officer Lloyd said.

25 Q. What is Officer Lloyd's position with the department?

1 A. Officer Lloyd works with the Crime Suppression Unit -- the
2 Northwest Crime Suppression Unit.

3 Q. What is that? What is the Crime Suppression Unit?

4 A. It's a proactive policing unit out of the Northwest
5 Precinct.

6 Q. What does that mean, "proactive policing unit"?

7 A. They do a little bit of everything from traffic stops to
8 supporting the patrol. I can't give you -- like, I mean, they
9 go out there and -- they're proactive, I guess you'd say. They
10 go out and look for stuff as opposed to responding to calls.

11 That would be the best way to put it.

12 Q. One of the things they do is look for potential illegal
13 searches, that kind of thing?

14 A. Illegal searches? What do you mean by that?

15 Q. Well, Officer Lloyd wanted to make sure that there weren't
16 going to be any suppression issues; right?

17 A. I believe so.

18 Q. Now, after this conversation with Officer Lloyd -- well,
19 let me go back a little bit further.

20 So do you remember how long this conversation outside the
21 window took place?

22 A. No.

23 Q. But it was after that that they knew -- then you have --
24 then you're claiming that you smelled an odor of marijuana;
25 correct?

1 A. Correct.

2 Q. And in your report, you wrote that it was a strong odor of
3 marijuana; correct?

4 A. Correct.

5 Q. But you didn't smell it -- an odor when you approached the
6 car initially; correct?

7 A. Not that I'm aware of.

8 Q. You didn't smell it when Mr. Kinloch first rolled down his
9 window?

10 A. I was standing at the back of the car.

11 Q. Well, you eventually removed Mr. Kinloch from the car;
12 right?

13 A. I did. And at that point, I was focused on officer
14 safety, so I can't remember if I smelled it or not in that
15 moment.

16 Q. Well, you would remember if you smelled marijuana at that
17 moment; right?

18 A. No. Like I said, I was focused on getting him out of the
19 car, so I can't say whether I smelled it at that moment or not.
20 I was focused on what I was doing at the time, which was making
21 sure there wasn't any weapons and getting him from the vehicle,
22 removed.

23 Q. What about when he was speaking to you after that? Do you
24 remember smelling an odor of marijuana?

25 A. Not at that time, no.

1 Q. Nowhere in your report did you say that you smelled a
2 strong odor of marijuana prior to -- right before your search;
3 right?

4 A. Not that I recall, no.

5 Q. And Bishop -- Officer Bishop never told you that he
6 smelled an odor of marijuana after he searched the car, did he?

7 A. I don't recall that.

8 Q. And you didn't smell it during this conversation with
9 Officer Lloyd when you were standing outside the car?

10 MS. MATEO: Your Honor, objection. I'm going to
11 object to calling it a conversation. The Government's going
12 to object. As Officer O'Neill has said, he doesn't know if
13 he was talking to him. The body-worn camera showed that they
14 were a few feet apart. So I'm going to object to the word
15 "conversation" because Officer O'Neill testified that he
16 doesn't know if he was talking to him.

17 THE COURT: Mr. Woodward, would you like to
18 recharacterize your question, perhaps?

19 MR. WOODWARD: I'll ask an additional question.

20 BY MR. WOODWARD:

21 Q. Officer O'Neill, do you remember if you were having a
22 conversation with Officer Lloyd?

23 A. I'm standing next to him. I can't recall. I'm assuming
24 we did have a conversation, but I don't know about what or --

25 Q. Would it help you to remember if I played the video from

1 here?

2 A. That's up to you, sir.

3 Q. Would it help you remember?

4 A. It could.

5 MR. WOODWARD: Your Honor, may I play the video?

6 THE COURT: Ms. Mateo, do you have an objection?

7 MS. MATEO: It's not an -- I believe -- well, yes, he
8 can play the video.

9 THE COURT: I can't think of any reason he can't.

10 So go ahead, Mr. Woodward.

11 (video playing.)

12 (video stopped.)

13 BY MR. WOODWARD:

14 Q. Fair to say you were having a conversation right outside
15 the car; correct?

16 A. Yes.

17 Q. And you didn't smell an odor of marijuana at that time;
18 right?

19 A. I don't know at that point what I had smelled or didn't
20 smell at that point.

21 Q. You don't know whether you were smelling an odor of
22 marijuana while you were talking about the legality of this
23 search?

24 A. I don't know what -- at what point this is in the stop.
25 Like, I can't directly point where this is at with this --

1 where is it, like, in the body camera footage? I'm guessing
2 this is after -- I don't know if this is after I've already
3 said I smell it or not. I don't know the context to -- like, I
4 know this is where you're at in the video, but I don't know --
5 I can't directly say where I'm at at this point in this stop.

6 Q. You don't remember if you searched the vehicle before or
7 after this conversation?

8 A. It's hard for me to find the context of where we are right
9 now, to be honest.

10 MR. WOODWARD: One moment, Your Honor.

11 MS. MATEO: Can we get a time stamp for the record,
12 please.

13 MR. WOODWARD: Time stamp at the current pause is
14 3111, Your Honor. I believe it's played through -- starting at
15 3050.

16 BY MR. WOODWARD:

17 Q. So you don't remember whether the -- your search occurred
18 after this point; correct?

19 A. I -- like I said, with -- where -- in the video, I don't
20 know exactly where we are, so I'm having trouble with the
21 context of if we had done something before or after just
22 because of where we've gone to in the video. I don't know the
23 exact -- I don't remember the exact video of -- you know what
24 I'm saying? Like, I can't say where I'm actually at right here
25 in this video, like, just the contextwise.

1 Q. Let me ask you this: Do you remember -- no one else told
2 you that they smelled marijuana prior to searching -- or prior
3 to you smelling the odor of marijuana; correct?

4 A. Not that I'm aware of.

5 Q. And if you smelled marijuana prior to when you claim that
6 you smelled it through the window, you would have wrote that in
7 your report or something; right?

8 A. For -- can you say that again real quick so I . . .

9 Q. I'm just -- I guess what I'm trying to get at is I can't
10 tell whether you're saying you didn't smell marijuana.

11 A. So off the initial, when I was at the back at the car and
12 when I pulled him out, I don't recall if I smelled marijuana or
13 not at that point. I was focused on getting Mr. Kinloch out of
14 the car. I do remember smelling it at a later point, correct.

15 Q. You can't remember whether you smelled it?

16 A. I remember that I smelled it at a point, yes. I did smell
17 marijuana emitting from the vehicle at a point, but I don't --
18 I believe it was when I was standing next to the vehicle, not
19 off the initial. If you're referring to the initial, I don't
20 remember if I did or not. But I remember smelling it when I
21 was close to that car. I did smell marijuana emitting from
22 that vehicle.

23 Q. Let me just put it this way.

24 You're conducting a DUI investigation here; right?

25 A. Officer Bishop is doing the DUI portion, correct.

1 Q. Correct. But you're the one who stopped this car?

2 A. Correct.

3 Q. You're interacting with Mr. Kinloch?

4 A. Yes.

5 Q. And you're saying you wouldn't have remembered whether you
6 smelled marijuana on him while he was talking to you?

7 A. During the initial portion -- or what do you mean? Like,
8 on him -- on his person or . . .

9 Q. Yes. You just --

10 A. I remember smelling --

11 Q. -- said you cannot remember --

12 THE COURT: Hold on, gentlemen. One at a time --

13 THE WITNESS: I apologize.

14 THE COURT: -- question and answer.

15 Mr. Woodward, ask your question.

16 And, Officer O'Neill, please speak up with your
17 answers a little bit more.

18 THE WITNESS: Yes, Your Honor.

19 BY MR. WOODWARD:

20 Q. Let me just say this: You didn't smell marijuana prior
21 to when you claimed you did when you approached the window;
22 correct?

23 A. Yes, that's correct.

24 Q. And no one else on the scene reported smelling marijuana
25 prior to you claiming that you smelled marijuana?

1 A. Not that I'm aware of.

2 Q. Now, you testified that you didn't lean inside the
3 vehicle; right?

4 A. Correct.

5 Q. But your head did go inside the window --

6 A. No.

7 Q. -- to smell; correct?

8 A. No.

9 Q. Now, you said that your body camera is on your chest;
10 right?

11 A. Correct.

12 Q. But it was actually at your stomach area; isn't that
13 right?

14 A. It was in my midsection. I can't say whether it's
15 directly -- it sits about center of my body, so --

16 Q. Do you mind standing and showing the Court where your body
17 camera was.

18 A. I believe about center, so --

19 THE COURT: Would you face me, please.

20 THE WITNESS: Yes, Your Honor. About --

21 THE COURT: Thank you.

22 THE WITNESS: -- center.

23 MS. MATEO: For the record, the witness is showing to
24 about the sternum of his chest above the abdomen. I don't know
25 if there's any objection to that description for the record.

1 THE COURT: You beat me to it, Ms. Mateo. That's
2 where I was going next.

3 MR. WOODWARD: I was going to say I would
4 characterize it as underneath the sternum, Your Honor, more in
5 the abdominal -- upper abdominal region.

6 THE COURT: Yeah. It's in the epigastric area.

7 You can proceed.

8 BY MR. WOODWARD:

9 Q. And how tall are you, Officer?

10 A. Approximately six-two to six-three.

11 Q. So if your body camera is pointed toward the ground, fair
12 to say your head is a good 3 feet in front of where the body
13 camera would be; correct?

14 A. I can't -- I don't know if 3 feet -- I don't -- I can't
15 speculate on how far ahead -- the camera does push forward with
16 the shirt because it's attached to the shirt, so the camera
17 will go farther forward, but I was not -- I don't believe
18 3 feet is an accurate estimate.

19 Q. So you're saying that you -- your head did not go inside
20 the vehicle?

21 A. Correct.

22 MR. WOODWARD: Your Honor, may I step back to play
23 from the video?

24 THE COURT: You may.

25 MR. WOODWARD: This is going to be from Exhibit 1,

1 | officer O'Neill's body camera, at 4139.

2 (video playing.)

3 (video stopped.)

4 MR. WOODWARD: I apologize, Your Honor. That was the
5 wrong time stamp. It's going to be 4055.

6 (video playing.)

7 (video stopped.)

8 | BY MR. WOODWARD:

9 Q. I'm going to pause it there briefly.

10 Officer O'Neill, that's Officer Lloyd on the other side of
11 the vehicle; correct?

12 A. Correct.

13 Q. And this is your body cam; correct? Can you tell that?

14 A. From what you've pulled up, it said it was my body camera,
15 correct. This is -- would be my body camera.

16 (video playing.)

17 (video stopped.)

18 BY MR. WOODWARD:

19 Q. I'm going to pause it there at 4058.

20 That's you leaned over --

21 A. correct.

22 9. -- the car: correct?

23 | And you're directly next to the side of the car: correct?

24 A. Correct.

25 Q. And your body camera is pointed directly down at your

1 feet; correct?

2 A. Close to, yes.

3 Q. And it's your testimony that your head is not inside the
4 car?

5 A. No. I don't break the threshold, which is like the window
6 area, to smell. So when you lean forward, it's attached to
7 your shirt. I can show you here. It goes like this, which the
8 camera will slide down, which is why, when I search a car,
9 a lot of times, it's looking down lower than where I'm actually
10 looking.

11 Q. It's very possible that you did go into the car, though;
12 correct?

13 A. I did not put my head in that car.

14 Q. Immediately after this, you asked -- well, first, you
15 asked officer Lloyd to see if he could smell it; right?

16 A. Correct.

17 Q. He declined to do so; correct?

18 A. Yes.

19 Q. Then you asked officer Bishop to smell; correct?

20 A. Yes.

21 Q. And you told him, "Just give it a smell. That way, we
22 have PC to search"; right?

23 A. I told him to confirm my suspicion that I could smell
24 marijuana.

25 Q. You were looking for probable cause to search the vehicle;

1 correct?

2 A. Correct.

3 MR. WOODWARD: One moment, Your Honor.

4 BY MR. WOODWARD:

5 Q. what was found in the car, according to you, was a
6 small -- was it the end of a blunt?

7 A. I believe it was a piece of a blunt, correct.

8 Q. Was it a joint, or was it a blunt?

9 A. Blunt.

10 Q. You didn't find that; right?

11 A. No.

12 Q. And you said it was field-tested?

13 A. Correct.

14 Q. Was it ever lab-tested?

15 A. I don't know if it -- I don't believe it was lab-tested.

16 It was a small amount.

17 Q. It was .3 grams; right?

18 A. Correct.

19 Q. And that included the paper?

20 A. I believe so.

21 Q. Was there a filter or anything in there?

22 A. Not that I'm aware of. I don't know.

23 Q. It was Officer Lloyd who found that; correct?

24 A. I believe so.

25 Q. He found it behind the passenger's seat; is that right?

1 A. I believe that's what he told me, yes.

2 Q. In a -- in the seat pocket?

3 A. I -- yes. I believe that's where he said he found it.

4 Q. Now that you've seen --

5 MR. WOODWARD: Well, I'll retract that, Your Honor.

6 I have nothing further, Your Honor.

7 THE COURT: Thank you, Mr. Woodward.

8 Ms. Mateo, any redirect?

9 MS. MATEO: Yes, Your Honor.

10 THE COURT: Let's give Mr. Woodward a chance to get
11 away from that podium, and then we'll have you come up.

12 REDIRECT EXAMINATION

13 BY MS. MATEO:

14 Q. Officer O'Neill, Officer Bishop is trained in sobriety
15 tests; is that correct?

16 A. Yes.

17 Q. Is that why he conducted it --

18 A. Yes.

19 Q. -- versus you?

20 A. Yes.

21 Q. And he made the conclusion that he had -- the defendant
22 had failed the sobriety test; correct?

23 A. Yes.

24 Q. At that point, put him under arrest?

25 A. Correct.

1 MR. WOODWARD: Your Honor, I object. It's a little
2 late of an objection, but as far as what his determination is
3 that Officer Bishop made as to impairment, I believe that was a
4 little hearsay too far.

5 THE COURT: Ms. Mateo.

6 MS. MATEO: Your Honor, on cross-examination, there
7 was some questions about the sobriety test -- whether Bishop
8 stopped the sobriety test; what, if anything, he said -- so I
9 believe Defense Counsel has most definitely opened the door for
10 any hearsay and it's appropriate for Officer O'Neill to respond
11 to that.

12 THE COURT: I don't know if opening the door gets you
13 over a hearsay objection but overruled.

14 You can continue.

15 BY MS. MATEO:

16 Q. Also on cross, there was some questions about the
17 defendant being on the phone.

18 Was he on the phone at the time you stopped him?

19 A. He did have his phone, correct.

20 Q. Did a woman arrive to the scene to get the car?

21 A. Yes.

22 Q. Did the police ever call anyone to pick up the car?

23 A. No.

24 Q. Did that woman arrive on her own --

25 A. Yes.

1 Q. -- during the search?

2 During your tussle, did the defendant yell anything to
3 that woman? Do you remember?

4 A. He was yelling for her to go inside the car --

5 Q. And do what?

6 A. -- and get something. I don't know what.

7 Q. On Exhibit 2, we watched some of the body-worn camera, and
8 I believe there was a question about some conversation. I want
9 to direct your attention to that.

10 When Bishop made the comment -- and I can replay it. When
11 Officer Bishop made the comment about continuing the search,
12 was he talking to you or just to his body-worn camera?

13 A. I don't know who he was talking to at that point.

14 Q. And the body-worn camera picks up the audio of the officer
15 wearing it; is that correct?

16 A. Correct.

17 Q. And, in fact, someone asked you after -- have you catched
18 your breath yet; is that correct?

19 A. Yes.

20 Q. Was this because this was after you had been sick?

21 A. Yes.

22 Q. Also, there were some questions about whether or not --
23 I believe on cross it looked like he was -- the defendant was
24 in the opposite lane; is that correct?

25 A. Yes.

1 Q. Do you remember the 9-1-1 dispatch call?

2 A. Yeah. I just remember the aired vehicle, be on the
3 lookout for, coming through.

4 Q. Was there any description of what that vehicle was doing?

5 A. It was a red sports car, and it said that it was in the
6 wrong lane of travel.

7 Q. So for it to be aired means someone called in --

8 A. Correct.

9 Q. -- to give those observations as well?

10 A. Yes.

11 Q. Here on Exhibit -- Government's Exhibit 1, the time stamp
12 is 4158.

13 This is when you smelled the marijuana at the window;
14 correct?

15 A. Yes.

16 Q. Is that the closest you ever approached the window in your
17 whole interaction with the defendant?

18 A. Yes.

19 MS. MATEO: If we can rewind to approximately 3111.

20 BY MS. MATEO:

21 Q. There was -- before I play it, there were some questions
22 on cross regarding the conversation with officer Lloyd, and you
23 didn't remember if it happened before or after the search; is
24 that correct?

25 A. Correct.

1 Q. Looking at 31 -- excuse me -- 3023 on Government's
2 Exhibit 1, is this Officer Lloyd and Officer Bishop?

3 A. No. That's -- on the left is an EMT.

4 Q. I apologize. I did say 31.

5 MS. MATEO: For the record, it's Government's
6 Exhibit 1, 3423.

7 BY MS. MATEO:

8 Q. I believe we viewed it on Bishop's body-worn camera,
9 Exhibit 2, but is this the conversation that Defense referred
10 to with Officer Lloyd regarding the search?

11 A. Yes.

12 Q. And, again, this is at 3421; is that correct?

13 A. Yes.

14 Q. So is it safe to say that these conversations happened
15 before you smelled the odor of marijuana?

16 A. Yes.

17 Q. At some point, did the defendant give a false name?

18 A. I believe he did.

19 Q. You stated that he was -- looked like he was driving on
20 the opposite side of the road, speeding.

21 And that was -- could that be a violation of reckless
22 driving?

23 A. Yes.

24 Q. As well as DUI; is that correct?

25 A. Correct.

1 Q. You also testified that he's -- the defendant struck you
2 and you tussled with the defendant; correct?

3 A. Yes.

4 Q. Is there any violation of law with him doing that?

5 A. Yes, felony obstruction.

6 Q. There was some questions about the small amount of
7 marijuana.

8 Is marijuana legal in the state of Georgia?

9 A. No.

10 Q. Is any quantity of marijuana legal?

11 A. No.

12 Q. So is that a violation of the law?

13 A. Yes.

14 Q. There was also testimony of an alcoholic residue in a
15 container.

16 Is that evidence of a violation of the law,
17 Officer O'Neill?

18 A. Yes, open container law.

19 Q. And that was found prior to your search as well; is that
20 correct?

21 A. Yes.

22 Q. And any observations made of the -- Defendant Kinloch were
23 made during your interactions prior to you getting sick; is
24 that correct?

25 A. Could you repeat that real quick so I --

1 Q. Yes. Any observations you had -- any interactions you had
2 with the defendant were prior to you getting sick --

3 A. Yes.

4 Q. -- and other officers, like Mr. -- Officer Lloyd, arriving
5 to the scene; correct?

6 A. Correct, yes.

7 Q. When searching a vehicle for DUI, what, if anything, do
8 officers search and look for?

9 A. Open containers. And then if there's --

10 MR. WOODWARD: Objection, Your Honor.

11 THE COURT: Hold on one second. Come on forward.

12 State the basis of your observation.

13 MR. WOODWARD: Objection as to the founda- -- I'm
14 going to say the relevance, Your Honor.

15 THE COURT: All right. The question was: What do
16 people look for when they're searching for evidence of DUI?

17 Your objection with that -- your objection is on the
18 basis of relevance; is that correct?

19 MR. WOODWARD: Well, I guess the foundation for --
20 as to why this officer -- let me rephrase that. This officer
21 hasn't testified that he searched on the basis of DUI, so
22 that would be the reason based on relevance, for that reason,
23 Your Honor.

24 THE COURT: Ms. Mateo, I'll hear you in response,
25 please.

1 MS. MATEO: May I ask a question to clarify,
2 Your Honor?

3 THE COURT: You may.

4 BY MS. MATEO:

5 Q. You had smelled the odor of marijuana; correct?

6 A. Yes.

7 Q. However, at that point, you had also observed Defendant
8 perhaps being under the influence?

9 A. Yes.

10 Q. When you searched, what evidence were you looking for of
11 what crimes?

12 A. You took for the crime of, basically, possession of, like,
13 an open container of alcohol or some kind of narcotics as well
14 as being under the influence.

15 THE COURT: Subject to that connection, the objection
16 is overruled.

17 BY MS. MATEO:

18 Q. And you had previously testified that you could
19 not determine whether it was narcotics or alcohol that
20 Defendant Kinloch was on; correct?

21 A. Correct.

22 Q. There was some discussion on cross, and I believe we saw
23 some of the video regarding the reasoning of the traffic stop
24 and discussions with your superior, Officer Lloyd; is that
25 correct?

1 A. Correct.

2 Q. However, at that point, you don't make a legal
3 determination of a search; is that correct?

4 A. Yes.

5 Q. Was there also a cup located in the defendant's vehicle
6 that included -- that had ash in it?

7 A. I believe so.

8 Q. Do you recall Officer Bishop or yourself searching the
9 defendant, Mr. Kinloch?

10 A. I believe Officer Bishop searched the defendant.

11 Q. Are you aware -- or do you recall what, if anything, was
12 found?

13 A. I believe he located a couple different pills.

14 MR. WOODWARD: Objection, Your Honor, just based on
15 personal knowledge here.

16 THE COURT: It's a hearsay objection, Ms. Mateo.

17 what's your response?

18 MS. MATEO: That it is -- I'll withdraw my question.

19 BY MS. MATEO:

20 Q. Did the investigation reveal that the defendant did not
21 have a valid driver's license?

22 A. I don't remember, honestly.

23 MS. MATEO: No more questions, Your Honor.

24 THE COURT: All right. Thank you, Ms. Mateo.

25 Ms. Root has been transcribing for about an hour and

1 a half under conditions, so we're going to take a very brief
2 recess of about 5 minutes, and I'll return to the bench.

3 You can have additional examination at that point,
4 Mr. Woodward.

5 COURT SECURITY OFFICER: All rise.

6 (A recess was taken from 11:41 a.m. to 11:48 a.m.)

7 COURT SECURITY OFFICER: All rise. This honorable
8 court is back in session. Come to order and be seated.

9 THE COURT: Mr. Woodward, come forward, and you may
10 continue with your cross.

11 Hold on one second because I don't see Ms. Root on
12 the screen. I just want to make sure we have her.

13 Ms. Root, are you present?

14 THE COURT REPORTER: Yes, sir, I'm here.

15 THE COURT: All right. Thank you so much.

16 Please proceed, Mr. Woodward.

17 RECROSS-EXAMINATION

18 BY MR. WOODWARD:

19 Q. I just want to clarify something here. You just testified
20 on redirect that the alcohol -- cup that smelled like alcohol
21 was found prior to your search.

22 A. I believe so.

23 Q. But that was actually found during your search; right?

24 A. I didn't find -- I -- I'm not sure --

25 Q. Okay.

1 A. -- so . . .

2 Q. You and Officer Lloyd searched the car together; right?

3 A. Correct.

4 Q. And that's -- and you don't know if that's when the
5 alcohol was found?

6 A. I believe he mentioned -- officer Lloyd mentioned
7 something about alcohol then, yes.

8 Q. Okay. So the alcohol bottle was not found prior to your
9 search?

10 A. No.

11 Q. Any container with the smell of alcohol was not found
12 prior to your search?

13 A. Not that I'm aware of, no.

14 Q. Okay. I just wanted to clear that up.

15 And you're having trouble recalling some of the details of
16 this event; right?

17 A. Yes.

18 Q. I mean, it's understandable. It happened a while ago;
19 right?

20 A. Yes.

21 Q. Why -- but you remember very clearly that you didn't put
22 any part of your body into the window; correct?

23 A. Correct.

24 Q. Is that because of your discussions of the issue with the
25 U.S. Attorney prior to this hearing?

1 A. No. That's because of -- in general, I don't put my head
2 inside of a car to smell for marijuana. I don't break the
3 threshold of that window in any -- all of my stops.

4 Q. In all of your stops, you try not to break the threshold
5 of the window?

6 MS. MATEO: Objection. Asked and answered,
7 Your Honor.

8 THE COURT: You can answer it one final time.

9 A. I don't break the threshold on the window, no. I don't
10 put my head inside of the car.

11 BY MR. WOODWARD:

12 Q. But it is possible that at least some of your body went
13 into the car this time?

14 A. No.

15 Q. Now, Mr. Kinloch was charged with DUI less safe, alcohol;
16 is that correct?

17 A. Yes.

18 Q. He wasn't charged with any other DUI related to any other
19 kind of impairment?

20 A. Not that I'm aware of.

21 Q. And just to clarify another thing, you had testified this
22 still frame we have on the video at 3423 from Exhibit 1, that
23 that was the conversation that you had outside the car with
24 Officer Lloyd?

25 A. It looks to be that is one of my conversations with

1 Officer Lloyd, correct.

2 Q. But y'all had another conversation directly next to the
3 red car; correct?

4 A. Yes.

5 Q. Okay. And that was also prior to your search; correct?

6 A. Yes.

7 MR. WOODWARD: Nothing further.

8 THE COURT: Thank you, Mr. Woodward.

9 MS. Mateo, any additional questions for this witness?

10 MS. MATEO: No, Your Honor.

11 THE COURT: All right. Officer O'Neill, you may step
12 down and resume your seat in the gallery.

13 THE WITNESS: Thank you, Your Honor.

14 MS. MATEO: Your Honor, the Government does not have
15 any more witnesses; just argument.

16 THE COURT: All right. Very well.

17 Mr. Woodward, any witnesses or evidence to be
18 presented by the Defense?

19 MR. WOODWARD: No, Your Honor.

20 THE COURT: All right. Then I will hear argument.

21 As the Government has the burden, I'll hear from the Government
22 first.

23 MS. MATEO: Your Honor, may I approach?

24 THE COURT: You may.

25 MS. MATEO: Your Honor, the Government relies, as it

1 states in its response in opposition at Docket 34, on the
2 argument set forth in that response but will supplement now
3 hearing the testimony of Officer O'Neill.

4 As it relates to the first argument made by Defendant
5 in his motion that he was not lawfully arrested, the Government
6 believes the testimony and the facts support such an arrest.
7 Defendant Kinloch was stopped due to improper lane change,
8 speeding, reckless driving, and other violations of Georgia
9 law. That is very clear by the testimony of Officer O'Neill.
10 Given that, there was full probable cause to stop the vehicle
11 and his subsequent arrest, Your Honor.

12 The violation of state law in the driving of a
13 vehicle as described above has been found by case law to be
14 sufficient. Again, he was driving recklessly, speeding,
15 failing to signal, improperly changing lanes, not only as
16 observed by Officer O'Neill but, as he testified, that even
17 a 9-1-1 call to explain and describe that same improper lane
18 change was aired over dispatch, meaning someone called in to
19 state to the police that they also observed that. Also -- so
20 at that point, he could have been arrested for the offense of
21 reckless driving.

22 But then when they initiated the traffic stop,
23 Officer O'Neill then testified, also, about the observations he
24 made, the smell of alcohol, and it is -- under Georgia law, it
25 is illegal for someone to have -- or -- excuse me -- drive or

1 be in physical control of a moving vehicle under the influence
2 of alcohol that makes it less safe to drive. But putting
3 Mr. Kinloch, the defendant, under arrest was legal, Your Honor.

4 Then, as Officer O'Neill testified, the defendant
5 resisted arrest, swung at law enforcement, combative, not
6 listening. officers had to deploy the taser. In fact, Kinloch
7 knocked the taser out of the officer's hand, thus rising to
8 another offense by Defendant Kinloch.

9 He could have been placed under lawful arrest also
10 for felony obstruction, as Officer O'Neill testified, and
11 simple battery of a police -- excuse me -- peace officer and
12 resisting. Thus, the Government has shown that this arrest was
13 legal.

14 As it relates to the search, it is well-established
15 that a traffic stop is a constitutional detention if it's
16 justified by reasonable suspicion or probable cause to believe
17 the traffic violation has occurred, and officers can then
18 search for evidence of criminal activity due to observations
19 they made by the defendant.

20 In this case, again, Officer O'Neill stated that
21 the defendant was slurring speech. He could smell the odor of
22 alcohol on the defendant. At this point, the officers could
23 have searched the vehicle.

24 Now, Officer O'Neill testified that he got ill.
25 There was some talk about a search by Officer Bishop. While

1 Officer Bishop did not testify today, the Government will
2 proffer -- and the Defense is welcome to correct, but
3 Officer Bishop did sweep the vehicle; at that point, did not
4 find anything.

5 However, it wasn't until Officer O'Neill -- as he
6 testified, other officers came. He got some medical help,
7 drank some water. Then he conducted and continued his
8 investigation of the crime. While he did search marijuana, the
9 Government would state that he could have walked up to that car
10 again and searched for evidence of DUI.

11 THE COURT: So you said search mar- -- did you mean
12 smell marijuana?

13 MS. MATEO: Excuse me. Yes, smell marijuana. He
14 could have searched the vehicle for DUI in addition to the
15 marijuana.

16 At that point, based on the totality of the
17 circumstances, while he got sick, it is not different than
18 officers moving a vehicle or towing a vehicle to get into a
19 safer spot or stopping a search and continuing it on due to
20 something that happened.

21 Here, Officer O'Neill got physically ill. Other
22 officers showed up. A search then continued on moments after.
23 However, the probable cause is still there. All the
24 observations made were still observed: the improper lane
25 change, the smell of alcohol, the slurred speech, the pinpoint

1 pupils, the failure of the sobriety test.

2 THE COURT: But to be clear, it's the Government's
3 position that that evidence taken in toto constituted
4 sufficient probable cause to search the car even if no
5 marijuana had ever been smelled?

6 MS. MATEO: Correct.

7 THE COURT: All right. Please proceed.

8 MS. MATEO: Then after Officer O'Neill, as he
9 testified, approached the vehicle, as noted, there were some
10 conversations near the vehicle; however, Officer O'Neill
11 testified it wasn't until he went up to the threshold of the
12 window that he could smell the odor of marijuana.

13 Then he asked Officer Bishop to come and confirm that
14 smell, which Officer Bishop did. On top of that, marijuana was
15 found in the vehicle ultimately in addition to the firearms and
16 a blunt, meaning it had been smoked, with ash as well.

17 Thus, those -- the smell of marijuana gave probable
18 cause, and the officer's actions established that reasonable
19 belief that there would be evidence of a crime of arrest found
20 within the defendant's vehicle. And Officer O'Neill did state,
21 even though there was some discussion, that the small amount of
22 marijuana is still illegal, to possess marijuana, and illegal
23 to smoke it and then drive.

24 So any -- and the case law has also shown that --
25 where officers are making arrests for DUI and could reasonably

1 expect to find additional evidence of DUI, such as alcohol
2 bottles, in the suspect's vehicle. And this is in the
3 Government's response, Page 10, Your Honor, regarding that
4 case law.

5 I believe that any argument made by Defense Counsel
6 regarding any illegal search by the officer entering the
7 vehicle to smell the marijuana has been shown today.
8 Repeatedly, officer O'Neill stated that he does not pass the
9 threshold. He explained the body-worn camera, why it points
10 down. Even looking at the screenshot, you could see that there
11 is still a few feet between the feet of officer O'Neill and the
12 car in that exhibit.

13 Again, even though there was a limited break between
14 the initial search and the substantive continued search -- and
15 I call the initial search the sweep by officer Bishop that came
16 up -- there's nothing illegal about that, and the totality of
17 the circumstances still existed: again, the defendant's erratic
18 driving, his failed sobriety test, the smell of alcohol on his
19 breath. The officers had probable cause to search the vehicle
20 and the compartments for evidence relating to that DUI, then,
21 further, for the marijuana once that was smelled.

22 The Government will proffer during
23 Officer Bishop's -- and the Court can see in Exhibit 2
24 Officer Bishop does not open any compartments, does not open
25 the glove compartment or the trunk to do a full search of the

1 vehicle.

2 Again, the Eleventh Circuit has held that it's got
3 this valid holding that the smell of marijuana alone is a basis
4 of reasonable suspicion to further investigation of criminal
5 conduct. As such, the Government believes not only was the
6 DUI sufficient and the observations made, as Officer O'Neill
7 explains, with the DUI and alcohol, but, also, the smell of
8 marijuana gave rise to a lawful, legal search and to the lawful
9 recovery of the firearms, Your Honor.

10 THE COURT: All right. Thank you, Ms. Mateo.

11 Mr. Woodward, I'll hear you in argument.

12 MR. WOODWARD: May I approach, Your Honor?

13 THE COURT: You may.

14 MR. WOODWARD: Well, Your Honor, first, as far as the
15 issue the Government briefly focused on as far as Mr. Kinloch's
16 seizure being unsupported by probable cause, I'm going to rely
17 primarily on the arguments from my motion and the exhibits
18 attached to that as well.

19 we have no testimony from Officer Bishop, obviously,
20 today, who conducted the field sobrieties, but Officer O'Neill
21 did testify that he doesn't -- didn't believe Officer Bishop
22 was showing -- was stumbling, was showing physical signs of an
23 impairment, and I --

24 THE COURT: Mr. Kinloch was not showing signs.

25 MR. WOODWARD: Yeah. I'm not sure how I misspoke.

1 Mr. Kinloch was not showing those signs. Obviously,
2 he didn't -- officer O'Neill didn't conduct these tests. We
3 don't have testimony from Officer Bishop today. But I would
4 just submit that there's not enough probable cause to arrest
5 here for DUI specifically, and I would rest on the arguments
6 from my motion, Your Honor.

7 As far as the multiple searches that took place
8 here, the Government attempts to justify these searches on two
9 separate grounds, I think. In the Government's argument just
10 a second ago, they focused primarily on the automobile
11 exception -- a probable cause search based on the automobile
12 exception; however, I believe, in the Government's brief, it
13 also -- in the response -- in their response, they also
14 attempted to justify this as a -- as Officer Bishop himself
15 stated, a search incident to arrest under Gant. So I'm going
16 to address those in part here.

17 The Government fails both under Number 1 and Number 2
18 here. Number 1, it's not justified as a search incident to
19 arrest under Gant. We don't have testimony today from
20 Officer Bishop, but I'll proffer as well, and the Government
21 has Exhibit 2 in evidence.

22 It's undisputed that Mr. Kinloch was arrested and
23 detained in the car; therefore, a Gant search can only -- is
24 only permissible if officers have a reason -- a reasonable
25 belief that there's evidence of DUI in the car. As you heard

1 in the body cam footage, officer Bishop simply stated on the
2 search of the car incident to arrest.

3 In the case I cited in my motion, United States v.
4 Reagan, the Court held it's not -- it was not reasonable to
5 believe that evidence of DUI inside the passenger compartment
6 of a vehicle based solely upon the nature of the charge or the
7 existence of evidence that the driver -- that the vehicle's
8 driver was intoxicated. That's an Eastern District of
9 Tennessee case.

10 And there, the officer did not articulate any
11 particularized reason why he believed that the defendant's
12 vehicle contained evidence of DUI. And that's the same case
13 here. Officer Bishop simply went in and -- in fact, against
14 what Officer O'Neill said, to wait on that.

15 Now, even if Bishop's initial Gant search was
16 permissible, any further search cannot be justified as far as
17 any Gant search incident to arrest because once Bishop searched
18 the areas that he thought were suspicious, removed the cups
19 from the car and said that he didn't have any evidence of DUI,
20 this dispelled any reason to believe -- under Gant to believe
21 that the evidence -- or that the vehicle contained evidence of
22 DUI.

23 THE COURT: Mr. Woodward, let me ask you a
24 question. I recognize that it is the Defense's position that
25 Officer O'Neill's smelling of any marijuana was the product of

1 his head being placed inside the automobile.

2 But if his head was not placed inside the automobile
3 and he smelled marijuana, does that not provide him with a
4 basis to search at that point?

5 MR. WOODWARD: Well, that's correct, Your Honor. If
6 it's -- if the Court finds that is a credible claim and as --
7 we admitted as much in our motions here. That's clear as far
8 as the Eleventh Circuit and other case law, that the odor or
9 marijuana does provide probable cause under the second prong --
10 or second basis I'm going to talk about as far as the
11 automobile exception.

12 However, I think there -- so moving on to that now,
13 basically, there are a couple of reasons -- well, first of all,
14 as far -- I'll just say the odor of marijuana. We had
15 testimony here that there's this conversation that occurs right
16 outside of the vehicle, the suspect's vehicle, and it's with
17 Officer Lloyd and Officer Bishop and Officer O'Neill. And
18 Officer Lloyd, at that point, is voicing concerns about
19 whether -- make sure they're doing a legal search. This is
20 after Officer Bishop has already gone through the car once.

21 Now, right after that is when -- or shortly after
22 that, I should say, is when Officer O'Neill claims -- makes his
23 claim for the first time of odor of marijuana. And this claim
24 is just simply not credible because of timing and because of a
25 number of other things.

1 O'Neill didn't report -- you know, he was kind of
2 like back and forth. Maybe he didn't remember. I mean, he
3 remembered odor of alcohol very clearly and wrote that in his
4 report. Never wrote anything about odor of marijuana prior to
5 smelling it later. Didn't report it when Mr. Kinloch opened
6 the door. When he patted him down, couldn't remember if he
7 smelled marijuana.

8 Officer Bishop never reported smelling marijuana
9 during his first search where he went through both -- I mean,
10 I'll proffer it. It's in Exhibit 2 where he went through both
11 the passenger and driver's side, removed cups. Never said
12 anything about odor of marijuana at that point.

13 No one else on the scene ever said anything about
14 an odor of marijuana even though this window is open. They're
15 having a conversation right next to it. And prior to
16 Officer O'Neill saying, "Oh, now I smell an odor of marijuana,"
17 no one else reported that.

18 The timing is just suspect because this is right
19 after Officer Lloyd is talking about, "Oh, I'm not -- you know,
20 let's make sure we don't get this suppressed. Let's" -- he has
21 concerns about this stuff. Now, all of a sudden, we have this
22 strong odor of marijuana.

23 Now, they do find this small -- what's been referred
24 to as a blunt, I guess, a roach, .3 grams including the paper
25 that was in the back seat -- or in the passenger's side seat

1 back pocket, buried down in there. Where Officer O'Neill is
2 claiming that he smelled a strong odor of marijuana is at the
3 threshold of the opposite side on the passenger's seat -- or --
4 I'm sorry -- on the driver's side. I simply don't think that
5 this is credible, that he suddenly smelled this odor of
6 marijuana, for all those factors.

7 In addition, I don't find his testimony that he's
8 absolutely sure that he did not break the threshold credible
9 given all those factors and, then, also given the fact that he
10 had so many bad recollections about other things to do with
11 this stuff.

12 But he remembers for sure -- and Your Honor saw the
13 still image and, as well, has played through where the body cam
14 was pointing. Now, I know the officer is trying to say his
15 shirt should have got -- that the body cam would get -- go
16 down on his shirt and change the angle of the camera, but the
17 Government just characterizes him being a few feet from the
18 car.

19 And I don't believe that that is accurate. I think
20 it shows Officer O'Neill's feet just inches from the car, his
21 body cam pointed straight down at his feet. And I just don't
22 believe it's credible that no part of his body was in the car
23 at that point. And as I argued in my motion under
24 Montes-Ramos, an officer is not permitted to gain probable
25 cause by going into the vehicle even by a few inches. And that

1 argument is laid out in my motion.

2 So, yes, the odor of marijuana can be the basis for a
3 probable cause search under the automobile exception, but here,
4 Officer O'Neill, I don't believe his testimony is credible as
5 far as the odor of marijuana itself, and I don't believe it's
6 credible as far as him not breaking the threshold here.

7 For both of those reasons, a search under the
8 automobile exception is unjustified in this case, as well as
9 it can't be justified under Gant as a search incident to
10 arrest. And for those reasons, we ask the Court to suppress
11 the evidence that came as a result of the search.

12 THE COURT: All right. Thank you, Mr. Woodward.

13 Ms. Mateo, would the Government like a final word?

14 MS. MATEO: Yes, Your Honor.

15 The Government just wants to reiterate there was
16 a lot of focus on the marijuana but that, again, there was an
17 arrest for DUI and for driving under the influence, smell of
18 alcohol, and there is an exception and also justification to
19 search the vehicle for evidence of the DUI.

20 But, also, any argument made about the credibility
21 of Officer O'Neill, again, the Government points the Court to
22 watch the body-worn camera or at least the still footage of the
23 bending over, seeing the distance, and also, again, that there
24 was marijuana ultimately found.

25 There was some discussion just now about where the

1 marijuana was found, but, again, we have to rely on the
2 testimony of Officer O'Neill that the defendant was seen
3 putting his hand in the back of the car, putting his hand near
4 the passenger's seat. So there could have been movement of
5 such marijuana even though there still was ash found in the
6 car.

7 Also, any smell of alcohol that Officer O'Neill did
8 smell was when he removed him from the vehicle and walked away
9 from the vehicle with the defendant. So any smell of alcohol,
10 again, would be in the car. If someone smoked marijuana --
11 and I'm sure the Court is very aware through testimony in
12 suppression hearings that the smell of marijuana sometimes can
13 be smelled from outside the vehicle if someone's driving up.
14 So that smell stays there if it's been smoked. And that's the
15 Government's argument, especially with evidence of the blunt
16 and the ash.

17 Last -- also, there was discussion about his
18 credibility. The first time he smelled it is when he said it
19 at that point. That's also the first time, as Officer O'Neill
20 testified, he approached the window. All other times in his
21 testimony, he was at the back of the vehicle for officer
22 safety. Conversations were had.

23 But, again, I would rely on the body-worn camera
24 when there's -- first, Officer O'Neill is getting ill but also
25 discussions -- "Have you caught your breath yet?"

1 And, yes, officer Lloyd does get there as a
2 supervisor, has those discussions of the search. But as
3 you can listen, when the Court takes that time to review
4 the body-worn camera, those discussions are, "what did you
5 observe?" And he's trying to get the officer to articulate
6 what was observed.

7 And everything that was articulated was articulated
8 here, that he saw the improper lane change, that he saw the
9 speeding, that there was evidence of DUI, that he failed the
10 sobriety test.

11 And so those officers are not lawyers. They may
12 have those discussions, but I would not rely on that to say
13 that there was an illegal search and they were trying to make
14 it legal. They were having those discussions, but it's
15 consistent with the testimony today of what was observed by
16 Officer O'Neill. He has consistently said what he observed,
17 the observations of the alcohol as well as the smell of
18 marijuana, and, again, stated he didn't pass the threshold,
19 Your Honor.

20 THE COURT: All right. Thank you, Counsel.

21 THE DEFENDANT: (Indiscernible; audio distortion.)

22 THE COURT: Yes, Mr. Kinloch.

23 THE DEFENDANT: Your Honor, I --

24 THE COURT: Mr. Kinloch --

25 THE DEFENDANT: Your Honor, may I (indiscernible;

1 audio distortion)?

2 THE COURT: Mr. Kinloch, I would advise you not to
3 speak at this point. Your counsel is here and present.

4 THE DEFENDANT: I would like to address the record,
5 Your Honor, if I may.

6 MR. WOODWARD: Mr. Kinloch, may I --

7 THE DEFENDANT: I believe -- I believe --

8 MR. WOODWARD: Mr. Kinloch --

9 THE DEFENDANT: I believe I have the right to --

10 THE COURT: Mr. Kinloch --

11 MR. WOODWARD: Mr. Kinloch --

12 THE COURT: Hold -- Mr. Woodward, hold on.

13 Mr. Kinloch, just hold on one second. Mr. Woodward
14 wants to say something to you.

15 THE DEFENDANT: I'm listening.

16 MR. WOODWARD: Mr. Kinloch, evidence is closed in
17 this hearing. I would advise you not to speak on the record.
18 Everything that you say can be used against you, and it's also
19 recorded. It'll be part of the permanent record and can be
20 used at a later court hearing.

21 THE DEFENDANT: With all due respect, Mr. Woodward,
22 I totally understand that.

23 Judge, I would still like to address the record with
24 your consent, please. Today, I've heard a lot about marijuana
25 being found in the vehicle, but I've never been charged with

1 marijuana, Your Honor. I've never heard anything about
2 marijuana as much as I have today.

3 I've never been charged with marijuana in this case.
4 I've never heard much about marijuana until today in this case.
5 I don't know anything about -- marijuana has never been logged
6 into the evidence in my case, so I don't know about this
7 marijuana that they keep speaking about so much.

8 And I was -- if I had the opportunity, as everyone
9 else does in this case, to speak with my attorney, then I
10 would. But due to the circumstances of the case, my only
11 opportunity to say this would be to ask the judge to allow me
12 to address the record in this way.

13 I've never been charged with marijuana. I don't know
14 anything about any marijuana being found in that vehicle. My
15 first time hearing about marijuana as much as I have has been
16 today. I've heard the Government state that marijuana is
17 not -- is illegal in the state of Georgia in any way, shape,
18 form, or fashion, in any amount.

19 So in that instance, if they had found marijuana,
20 I believe I would have been charged with marijuana because
21 it's said to be illegal. And I have never been charged with
22 marijuana, so I don't know anything about this marijuana that
23 they're claiming to have found, Judge. I just would like to
24 put that on the record.

25 THE COURT: You've made your statement, Mr. Kinloch.

1 It is of record.

2 Counsel, that concludes this hearing on the issue of
3 suppression. The Court will take the defendant's motion under
4 advisement and issue a ruling in due course.

5 We do still need to proceed to the motion regarding
6 release versus detention. It seems to me that there would be
7 no need for Ms. Root to continue to transcribe that hearing.

8 So, Ms. Root, while you are welcome to stay if you
9 would like, I don't think it would be strictly necessary. And
10 if you want to sign off at this time, you can do so.

11 THE COURT REPORTER: Okay, Judge. Then I will go
12 ahead and sign off.

13 THE COURT: All right. Thank you, Ms. Root.

14 (Proceedings concluded at 12:16 p.m.)

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1 C E R T I F I C A T E
2

3 I, Victoria L. Root, Certified Court Reporter, in and for
4 the United States District Court for the Southern District of
5 Georgia, do hereby certify that, pursuant to Section 753,
6 Title 28, United States Code, the foregoing is a true, correct,
7 and complete transcript of the stenographically reported
8 proceedings held in the above-entitled matter and that the
9 transcript page format is in conformance with the regulations
10 of the Judicial Conference of the United States.

11 WITNESS MY HAND AND SEAL this 27th day of February, 2021.
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19

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